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No. 321

In the Supreme Court of the United States

OCTOBER TERM, 1958

ADOLFE CARTELLONE, ALSO KNOWN AS JOSEPH PRINCE,
PETITIONER

v.

JOHN M. LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 39–40; Pet. App. 22–23) is reported at 255 F. 2d 101. The memorandum opinion of the district court (R. 26) is reported at 148 Fed. Supp. 676.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1958 (R. 37; Pet. App. 23) and a petition for rehearing (R. 42–48) was denied on June 3, 1958 (R. 49; Pet. App. 23). The petition for a writ of certiorari was filed on August 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the order of deportation is supported by substantial probative evidence.

2. Whether it was proper to base the deportation order on charges lodged during deportation hearings.

STATUTES AND REGULATIONS INVOLVED

Section 242 (b) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1252 (b)):

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien.
>
> * * * * *
>
> Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—
>
> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of

the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

The pertinent regulations (8 C. F. R., January 1, 1958) provide as follows:

Section 242.14:

Evidence—(a) *Sufficiency.* A determination of deportability shall not be valid unless based on reasonable, substantial, and probative evidence.

* * * * * *

(c) *Use of prior statements.* The special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent, or any other person during any investigation, examination, hearing, or trial.

Section 242.16:

* * * * *

(d) *Additional charges.* An examining officer who has been assigned to a case may at any time

during a hearing lodge additional charges of deportability, including factual allegations against the respondent. The additional factual allegations and charges shall be submitted in writing and entered as an exhibit in the record. The special inquiry officer shall read the additional factual allegations and charges to the respondent and explain them to him in nontechnical language. The special inquiry officer shall advise the respondent if he is not represented by counsel that he may be so represented and also that he may have a reasonable time within which to meet the additional factual allegations and charges. The respondent shall be required to state then and there whether he desires a continuance for either of these reasons.

STATEMENT

In October 1941 a warrant of arrest was issued by the immigration authorities charging petitioner with prostitution activities in violation of the Immigraton Act of 1917. At a hearing held in February 1942, petitioner, a national of Italy, testified that after his entry into the United States in 1903 he traveled, in July or August of 1934 or 1935, to Crystal Beach, Canada, for a few hours to go to the bathing beach. He testified that he was questioned by customs authorities on his way to Crystal Beach, that he was asked to show the ownership of his car, and that he had no passport (I. F. 171–173).[1] He also said that he had been convicted of robbery and grand larceny in Niagara County, New York in 1922 (I. F. 11, 124). A

[1] The designation "I. F." refers to the immigration file, which is lodged with the Clerk of this Court.

hearing officer issued findings of facts and conclusions of law in which he found that petitioner was deportable for managing a house of prostitution and for having committed a felony prior to entering the United States in 1934 (I. F. 163–166). The hearing officer's findings were affirmed by the Board of Immigration Appeals (I. F. 124–130).

The case remained in status quo during the war until 1945. At that time petitioner's counsel filed an application to reopen the immigration hearing on the ground that additional evidence would be submitted both by petitioner and his wife, who did not testify at the original hearing, that petitioner did not run a house of prostitution (I. F. 116–123). The motion was granted (I. F. 114–115).

At the reopened hearing in March, 1947, both petitioner and his wife testified that petitioner did not go to Crystal Beach, Canada, in 1934 or 1935 as petitioner had originally testified. They said that instead they went to Goat Island in Niagara Falls, New York. Petitioner testified that after the first hearing he discussed the trip to Crystal Beach with his wife and she said she was positive that they did not go to Canada at that time (I. F. 323–329).[2] His wife said that they had visited friends (Mr. and Mrs. Theodore

[2] Petitioner testified that the next occasion on which he discussed this visit with anyone was a year and a half later, after receiving the "verdict" that he was subject to deportation. He testified that his then attorney told him that "It's too late now." He next discussed this matter, he testified, in 1945 or 1946 when he retained his present counsel (I. F. 325).

Calato) in Buffalo, New York, with whom they had dinner. Her husband drank wine, and although he was not intoxicated he was mixed up in his directions (I. F. 333–337, 344–346). Petitioner, his wife and the Calatos thereafter drove to Niagara Falls, New York (I. F. 334), no mention being made of Crystal Beach. The Calatos did not accompany petitioner and his wife to the waterfalls but got out of the car in the city of Niagara Falls after telling them how to reach a bridge leading to a little island from which they could see the falls (I. F. 334–335). Petitioner's wife testified no one spoke to them before they crossed the bridge (I. F. 335). They stayed at the island for 15 or 20 minutes and then returned to the city of Niagara Falls where they picked up the Calatos (I. F. 337, 346).

At a continuation of the hearing in July, 1947, the presiding officer lodged an additional charge against petitioner, that he had been convicted of robbery prior to entering the United States in 1934—*i. e.*, the Crystal Beach re-entry. There was admitted in evidence the record of petitioner's conviction in 1922. The hearing officer offered petitioner an opportunity to be heard on this charge and additional time if he wished to present additional evidence on this new charge. Petitioner did not desire to present any evidence or wish any more time (I. F. 347–352). The presiding immigration officer found as a result of the second hearing that under section 19 of the 1917 Act, petitioner was deportable as an undesirable alien

[*] Petitioner testified that he had lived in Buffalo in 1919 for about two or three months (I. F. 325).

because he had been convicted of a felony prior to his entrance into the United States, that is, prior to 1934, and that he admitted having committed such felony (I. F. 111–112). He felt that petitioner's "activities in connection with prostitution are not such that they may be used as a basis for deportation * * *" (I. F. 111) since they were not contemporaneous with his arrest by the immigration authorities (I. F. 107). On appeal the Board of Immigration Appeals affirmed the order.

In 1951, the order and warrant of deportation were withdrawn (I. F. 77, 78) on motion of the Immigration Service which noted that inasmuch as "the respondent still contends that he never left the United States after his original entry in 1903, it would appear advisable to re-examine the entire question as to whether or not respondent visited Canada in 1934 or 1935, particularly in view of the fact that respondent may have additional evidence to submit concerning his alleged contention regarding an absence of a re-entry into the United States" (I. F. 79). Accordingly, in June 1955, a new hearing before the Immigration and Naturalization Service was held.

At that hearing charges were lodged under the 1952 Act that petitioner was deportable as having been convicted of a felony in 1922, prior to re-entry into the United States in 1934 or 1935. When questioned as to whether he desired additional time to meet these charges he indicated that he was ready to proceed with the hearing (I. F. 47–53). Petitioner did not present additional evidence (I. F. 49, 62). His counsel stated that he "[did] not choose to present any addi-

tional evidence or to add anything to the previous evidence that has been given on behalf of the relator and witnesses and [chooses] to rest on that record * * *" (I. F. 49). Thus petitioner made no effort to corroborate his and his wife's testimony with respect to the visit to Goat Island. The government introduced in evidence a map showing Goat Island on the Niagara River, New York, and Crystal Beach on Lake Erie, Canada (I. F. 53, 63a).

The Special Inquiry Officer found petitioner deportable under 8 U. S. C. 1251 (a) (1) (the 1952 Act) and under section 19 of the 1917 Act (39 Stat. 889-890) in that he had been convicted of a felony—robbery, first degree—prior to his last re-entry into the United States, in 1934, from Canada. Adopting the findings of the 1947 hearing officer, he also found that petitioner was not deportable for any alleged prostitution activities since they were not contemporaneous with the immigration arrest (I. F. 40–46). After argument before the Board of Immigration Appeals, the appeal was dismissed (I. F. 10–15).

Petitioner filed an action for review in the United States District Court for the Northern District of Ohio. The district court sustained the order of deportation as being supported by substantial evidence, that is, the sworn testimony of petitioner at the original hearing (148 Fed. Supp. 676). The Court of Appeals affirmed (Pet. App. 22–23).

ARGUMENT

1. Petitioner contends (Pet. 7–16) that the government failed to prove by "reliable, probative and

substantial evidence" that he reentered the United States in 1934 after having been convicted of a felony in 1922. He relies on the fact that the evidence of the 1934 entry was his 1942 admission of his re-entry from Canada which he retracted for the first time in 1947 (I. F. 90). But such testimony, as an admission against interest, constitutes substantial evidence against petitioner, even though denied subsequently. See *Miles* v. *United States*, 103 U. S. 304, 308–309, 311; 4 Wigmore, *Evidence* (3rd ed.), Section 1048. That is particularly true under the circumstances presented by this record. Petitioner's admissions were definite, unequivocal, and were made at a time when he apparently was unaware of their significance (cf. I. F. 90). In his 1942 hearing he said that he was questioned at the bridge and that he was asked to show the title to his car. This is the normal procedure when crossing into Canada. In addition, petitioner said that he entered Canada to go to the bathing beach. Crystal Beach is an amusement park and a bathing beach on Lake Erie, about 35 miles from the Falls. On the other hand, Goat Island is merely a part of the park at Niagara Falls, New York, connected with the mainland by a small bridge, from where the Falls are viewed. There is no questioning when crossing the bridge, and the island itself contains no beaches suitable for bathing and is merely a point from which to view the falls (I. F. 19–20). Moreover, petitioner's delay in retracting his admission and the circumstances surrounding that retraction (see *supra*, p. 5) cast strong doubt on its credibility. For these reasons, as the district court held (148 Fed. Supp. 676,

681), the order of deportation "was supported by substantial evidence * * *".[4]

Petitioner argues, on the basis of *Gonzales* v. *Landon*, 350 U. S. 920, that his own admissions are an inadequate foundation for a deportation order. But *Gonzales* involved loss of nationality by a native born citizen, not deportation of an admitted alien. The standard of "clear, unequivocal and convincing evidence" applicable to loss of nationality does not apply to deportation, as to which the statute (Section 242 (b), *supra*) fixes the standard of "reasonable, substantial and probative evidence". Moreover, *Gonzales* involved subjective issues as to motivation, as to which conflicting statements were difficult to assess. Here, the prior admission concerned a simple fact to which petitioner testified in the kind of detail that imported verity. Deportation orders resting on voluntary admissions which bear the ring of truth have been sustained. *Schoeps* v. *Carmichael*, 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914; *Navarrette-Navarrette* v. *Landon*, 223 F. 2d 234, 237 (C. A. 9), certiorari denied, 351 U. S. 911.

Petitioner's argument that the evidence at the last hearing was insufficient because the hearing officer relied on the prior record (Pet. 14) is without merit. At the reopened hearing it was proper to rely on the 1947 record (8 C. F. R. 242.14 (c), *supra*, p. 3). The case was reopened for further hearing, particularly to

[4] Petitioner's assertion that the district court did not properly review the evidence (Pet. 16) is refuted by its opinion which shows that the court did review the administrative record and found the administrative conclusion adequately supported by substantial evidence.

permit *petitioner* to submit additional evidence regarding his alleged re-entry into Canada in 1934. Petitioner did not attempt to corroborate his revised version of the events. Indeed, at the last hearing, he objected to questions "on the ground that all of this testimony was covered in previous hearings and is now in the record." (I. F. 58; see also I. F. 61.)

2. Petitioner's contention that it was error to base his order of deportation on a charge lodged during the hearing is answered by the Immigration Regulations, 8 C. F. R. 242.16, *supra*, pp. 3–4, which were promulgated under 8 U. S. C. 1252 (b), *supra*, p. 2. The regulations specifically provide that charges may be lodged at deportation hearings. In accordance with these regulations, petitioner was given every opportunity to be heard on the additional charges lodged at the 1947 and 1955 hearings, and was offered additional time, which offer he declined, to be heard on those charges.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

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